

AUSTRALIAN JOURNAL OF ENVIRONMENTAL MANAGEMENT

ISSN 1322 1698

Volume 8

March 2001

Number 1

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The Australian *Environment Protection and Biodiversity Conservation Act 1999*: What Role for the Commonwealth in Environmental Impact Assessment?

Rachelle Padgett and Lorne K. Kriwoken*

The Australian Environment Protection and Biodiversity Conservation Act 1999 (*Cwlth*) was proclaimed on 16 July 2000. This Act represents the most fundamental reform of environment legislation since the 1970s and it will change dramatically the role of the Commonwealth in environmental impact assessment. The Environment Protection and Biodiversity Conservation Act provides for Commonwealth involvement in environmental impact assessment to be focused on six matters of 'national environmental significance'. Another significant feature of this Act is that it provides a framework for the accreditation of State and Territory environmental assessment and approval processes.

This article provides an outline of the repealed Federal environmental impact assessment legislation, the Environment Protection (Impact of Proposals) Act 1974 (*Cwlth*), an assessment of its deficiencies and a discussion of the key reviews of Commonwealth environmental impact assessment. The main features of the new Environment Protection and Biodiversity Conservation Act, along with the debate regarding the future role of the Commonwealth in environmental impact assessment, are then discussed. The issue of whether the new Act reflects an expansion or devolution of Commonwealth power with respect to environmental impact assessment is addressed and it is argued that the Act has the potential to expand Commonwealth power.

United States. The introduction of NEPA provided an impetus for the Commonwealth Government of Australia to seek ways of improving its procedures for protecting the environment (Thomas 1998). In 1974, the Commonwealth introduced the *Environment Protection (Impact of Proposals) Act 1974* (EPIP Act). This Act, which governed EIA at the Federal level until July 2000, marked a major advance in environment protection in Australia (Münchenberg 1995).

The EPIP Act has been criticised in recent years due to its failure to reflect best practice EIA standards (Prest & Downing 1998; Thomas 1998; Hill 1998a). A number of reviews of the EPIP Act have been undertaken in order to address its deficiencies (Thomas 1998; Münchenberg 1999). The key reviews include the House of Representatives Standing Committee on Environment and Conservation in 1979 and the review undertaken by the Commonwealth Environment Protection Agency (CEPA) from 1993 to 1995. In addition, three important intergovernmental agreements on EIA or related matters have been signed in the 1990s: the Australian and New Zealand Environment and Conservation Council's (ANZECC) *Basis for a National Agreement on Environmental Impact Assessment* in 1997, the Intergovernmental Agreement on the Environment (IGAE) in 1992 and the Council of Australian Government's (COAG) Agreement on Commonwealth/State Roles and Responsibilities for the Environment in 1997. Until recently, however, the outcomes of these reviews and intergovernmental agreements had not been translated into significant legislative reform (Münchenberg 1999).

In February 1998, the Federal Environment Minister, Senator Robert Hill, released a consultation paper outlining proposed reforms to the Commonwealth's environment legislation. This consultation paper foreshadowed the introduction of new EIA legislation that would replace the EPIP Act (Hill 1998a). On 2 July 1998 the *Environment Protection and Biodiversity Conservation Bill 1998* was introduced to the Senate. By July 1999, this Bill had become an Act. The *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) was proclaimed on 16 July 2000.



Introduction

Environmental impact assessment (EIA) can be defined as a predictive process that evaluates the potential detrimental effects likely to arise from a proposed development (or other action) and determines procedures to mitigate these (Wood 1995). EIA helps decision-making authorities to make informed decisions about whether a project should be allowed to proceed and under what conditions (Bates 1995; Glasson *et al.* 1994).

The first statute to incorporate provisions for EIA was the *National Environmental Policy Act 1969* (NEPA) in the

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The EPBC Act will alter significantly the role of the Commonwealth in EIA. The Act provides that the Commonwealth's EIA process will be triggered by those activities that may have a significant impact on a matter of national environmental significance. The six matters defined by the Act are World Heritage properties, Ramsar listed wetlands, listed threatened species and communities, listed migratory species, protection of the environment from nuclear actions, and the marine environment. The EPBC Act also provides that the Commonwealth may accredit State and Territory environmental assessment and approval processes.

This article commences with an outline of the Commonwealth's previous EIA legislation (the EPIP Act). The deficiencies of the EPIP Act and the key reviews of the Commonwealth of Australia's EIA system are then discussed. The Commonwealth's new EPBC Act is then introduced and the debate regarding the Commonwealth's role in EIA as established by the Act is presented.

Environmental Impact Assessment under the Environment Protection (Impact of Proposals) Act 1974

Application of the Environment Protection (Impact of Proposals) Act

Until recently, the EPIP Act governed EIA at the Federal level in Australia. The Act was introduced in 1974, the Administrative Procedures under the Act were gazetted in 1975, and amendments were made to the Administrative Procedures in 1987. Environment Australia was the Federal agency responsible for administering the EPIP Act. The Act applied to all Commonwealth government proposals and projects directly funded by the Commonwealth, or those requiring a Commonwealth decision and deemed to affect the environment to a significant extent (Thomas 1998). The decision about whether an action was environmentally significant was later assisted by ANZECC's *Guidelines and criteria for determining the need for and level of environmental impact assessment in Australia* (Environment Australia 1997).

The major steps in the Commonwealth's EIA system under the EPIP Act are shown in Figure 1. The EIA process began with the Minister (the 'Action Minister') or agency responsible for the proposed action deciding that the action was environmentally significant. The EPIP Act provided for four levels of assessment: assessment without an Environmental Impact Statement (EIS) or Public Environment Report (PER), assessment following

a PER, assessment following an EIS and examination by a Commission of Inquiry (Environment Australia 1997). The Action Minister, who decided whether a project should proceed, took the final step in the EIA process.

Some proposals required assessment under both State and Territory legislation and Commonwealth EIA legislation. Where this occurred, arrangements were made with the States and Territories to facilitate joint or cooperative assessment of proposals. These arrangements needed to satisfy the requirements of the IGAE and ANZECC's *Basis for a National Agreement on Environmental Impact Assessment*. Joint assessments involved both the Minister for the Environment and the State or Territory directing a PER or EIS (or the equivalent under State and Territory legislation) and each jurisdiction was responsible for assessing the documentation and making its own decision (Environment Australia 1997). Cooperative assessments involved one jurisdiction only directing the assessment document.

Deficiencies of the Environment Protection (Impact of Proposals) Act 1974

The EPIP Act, "while progressive at the time it was introduced, has been widely regarded for years as outdated and in need of substantial overhaul" (EDO NSW 1999, p. 11). To appreciate the need for EIA reform at the Commonwealth level, it is necessary to acknowledge the deficiencies of the EPIP Act. Some of these deficiencies are discussed below.

Jurisdiction of Commonwealth Environmental Impact Assessment

Critics have identified a number of limitations on the way in which the Commonwealth's jurisdiction in EIA (under the EPIP Act) operated (CEPA 1994a; Münchenberg 1997). One of the most significant limitations was that the EPIP Act did not enable the Commonwealth to assess all projects that raised environmentally significant issues of national or international importance. The EPIP Act could only be invoked for projects that raised environmentally significant issues of national or international importance if those projects were being undertaken by a Commonwealth agency or were subject to some other Commonwealth approval (CEPA 1994a). This situation compromised the Commonwealth Government's ability to implement its national and international environmental commitments as not all activities affecting such commitments were necessarily subject to EIA.

The EPIP Act also attracted criticism with regard to the

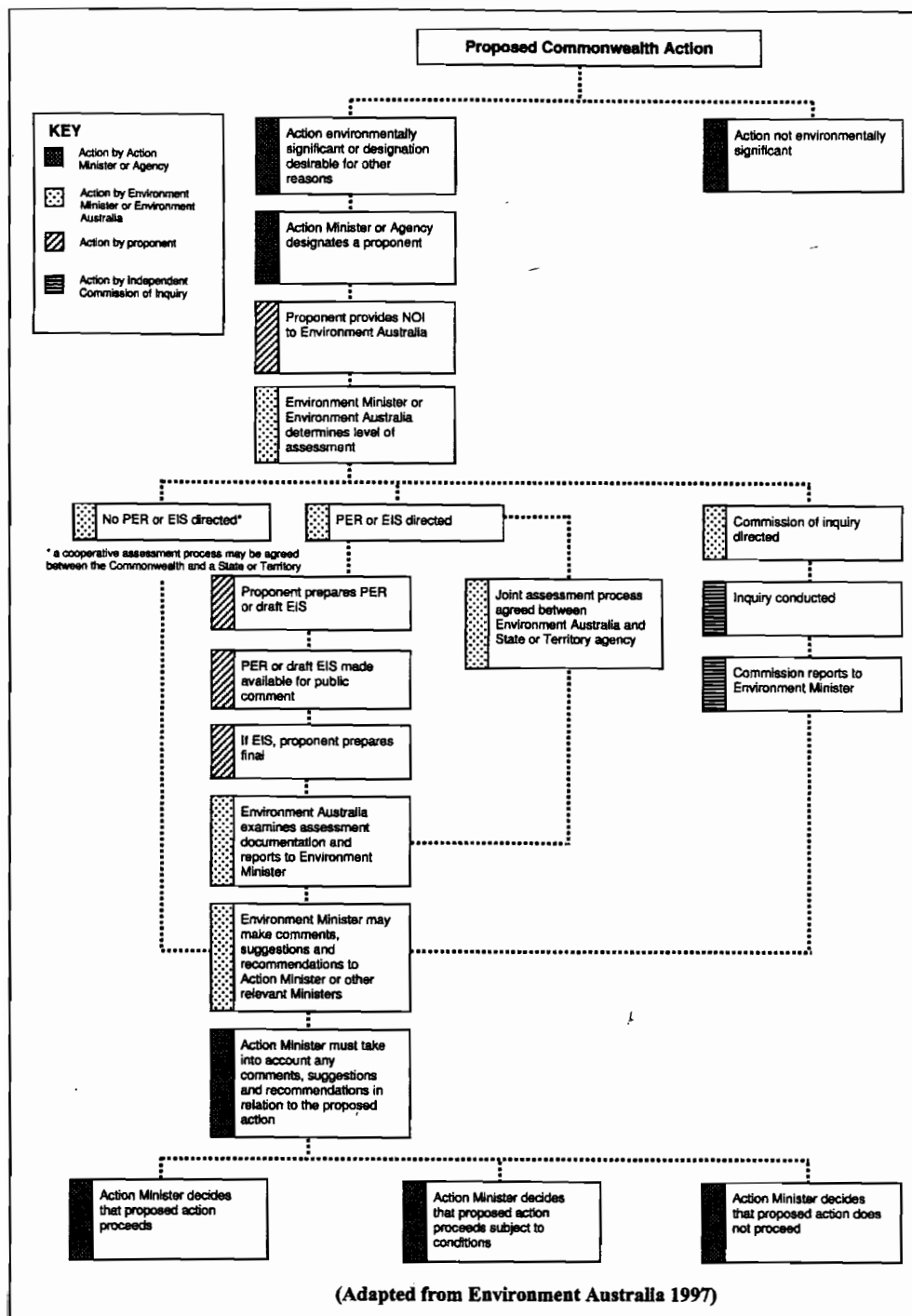


Figure 1: The Major Steps in the Commonwealth's EIA System under the EPIP Act

extent of overlap between Commonwealth and State and Territory EIA legislation and the lack of a consistent approach to EIA across Australia (Barker 1995; CEPA 1994a). Some commentators suggest that this overlap produced unnecessary duplication, delays in the assessment process and uncertainty for proponents (Hill 1998a; Stone 1995).

Triggering Environmental Impact Assessment

■ Ad hoc triggers

The EPIP Act's mechanism for triggering Commonwealth EIA was often cited as a deficiency of the EPIP Act (Münchenberg 1997). The Act was triggered in an ad hoc and indirect manner by criteria, such as Commonwealth funding and foreign investment approvals, which were not specifically environmentally-related (Münchenberg 1998; Hill 1999). Under the EPIP Act, for example, it was possible for a gold mine proposal to be assessed if it was owned by a foreign company, but if it was totally Australian-owned it might not have triggered the Act.

■ Uncertainty

The triggering mechanism was also criticised on the grounds that it did not provide certainty of what types of proposals required assessment (Gascoigne 1997; Hill 1998a, 1998b). The EPIP Act did not define what activities would have a significant impact on the environment so the Action Minister was able to exercise considerable discretion in determining which projects should have been assessed (CEPA 1994a). The unfettered discretion of the Action Minister left government, industry and the community

uncertain as to when the EPIP Act would be applied (CEPA 1994a).

■ Inappropriate timing

The EPIP Act was often triggered at a late stage of the project, particularly with regard to private sector proposals (CEPA 1994a). The Commonwealth Environment Protection Agency argued that late referral

of environmentally-significant proposals compromised the Commonwealth's environment protection responsibilities, could make modifications to proposals difficult and costly and could also "result in environmentally significant proposals not being brought to the attention of the community through the public review process" (CEPA 1994a, p. 3).

Role of the Action Minister

One of the most criticised features of the EPIP Act was that the Action Minister (rather than the Environment Minister) decided whether a Commonwealth action was environmentally-significant (i.e. triggered the EIA process), made the final approval decision and, notwithstanding any environmental recommendations made by the Environment Minister, could impose conditions on an approval when one was granted (EDO NSW 1999; Guest *et al.* 1999). McDonald (1998) argues that it was inappropriate for the Action Minister to be responsible for making such key decisions under the Act as he or she may have had a vested interest in ensuring the project's approval.

Reviews of the Commonwealth's Environmental Impact Assessment Regime

The Commonwealth's EIA system under the EPIP Act was reviewed a number of times following the introduction of the Act in 1974 (Thomas 1998). The following reviews and intergovernmental agreements were designed to address some of the deficiencies outlined above.

House of Representatives Standing Committee on Environment and Conservation

The first major review of the Commonwealth's EIA system was carried out in 1979 by the House of Representatives Standing Committee on Environment and Conservation in its inquiry into *Environmental Protection - Adequacy of Legislative and Administrative Arrangements* (Guest *et al.* 1999). This Committee endorsed a broad role for the Commonwealth in EIA. The Committee also recommended that the EPIP Act be amended to allow the Environment Minister the discretion not to apply the Act if a proposal had been made subject to State or Territory EIA procedures and their assessment of that proposal satisfied the provisions of the Commonwealth Act (Fowler 1996).

Intergovernmental Agreement on the Environment

The Commonwealth, the States and Territories, and the Australian Local Government Association endorsed the IGAE in February 1992 (Fowler 1994). The IGAE aimed

to provide the basis for a new cooperative national approach to the environment; a better definition of the roles of respective governments; a reduction in the number of disputes between the Commonwealth and the States and Territories on environmental matters; greater certainty of government and business decision-making; and better environment protection (IGAE 1992).

Schedule 3 of the IGAE, which addressed EIA, proposed that "a general framework agreement between the Commonwealth and the States on the administration of the EIA process will be negotiated to avoid duplication and to ensure that proposals affecting more than one of them are assessed in accordance with agreed arrangements" (clause 4, IGAE). Schedule 3 also provided that the Commonwealth might accredit State and Territory EIA procedures. The IGAE has been criticised on the grounds that it was never submitted to public scrutiny during its negotiation and it represents a significant retreat by the Commonwealth in environmental matters (Fowler 1994; Dawson 1999).

Commonwealth Environment Protection Agency Review

Following the acceptance of the IGAE, the Commonwealth initiated an extensive review of the EPIP Act between 1993 and 1995 (Guest *et al.*, 1999; CEPA 1993). The objective of this public review was to "maximise the effectiveness and the efficiency of environmental impact assessment as a tool for achieving environment protection and for promoting ecologically sustainable development" (CEPA 1994a, p. i). The CEPA review was also designed to enable the Commonwealth Government to implement its responsibilities for EIA under the National Strategy for Ecologically Sustainable Development, the IGAE, and to implement international commitments such as Agenda 21 and the Rio Declaration (CEPA 1993).

The CEPA review canvassed a number of reform options, one of which was to change the jurisdiction of the Commonwealth's EIA legislation to enable proposals raising issues of national or international significance to be considered by the Environment Protection Agency (CEPA 1994a, 1994b). Another proposal was to give the Commonwealth Environment Minister greater powers to require referral of environmentally-significant proposals and to set binding conditions (Münchenberg 1994, 1995). CEPA also proposed to allow accreditation as a mechanism to minimise duplication of Commonwealth and State processes (Gascoigne 1997). The recommendations of the CEPA review were never implemented, however, due to a change in Federal government in 1996.

Australian and New Zealand Environment and Conservation Council (ANZECC)

Discussions about the issues of duplication and consistency in EIA culminated in the adoption of the *Basis for a National Agreement on Environmental Impact Assessment* (Thomas 1998). A draft of the agreement was released in 1991 and the ANZECC Ministers endorsed it in June 1997. The purpose of the ANZECC agreement was to provide a general framework for the administration of EIA processes for proposals which involved, or were likely to involve, more than one jurisdiction (Preamble, *Basis for a National Agreement on EIA*). The objectives of the agreement closely mirrored those of the IGAE, namely to improve the effectiveness and efficiency of EIA processes.

An Agreement on Commonwealth/State Roles and Responsibilities for the Environment

The next major phase in the reform of Australia's EIA system was the Review of Commonwealth/State Roles and Responsibilities for the Environment conducted for the COAG in November 1997. The attendees of the COAG meeting - all Heads of Government and the President of the Australian Local Government Association - extended in-principle endorsement to the COAG Agreement (Hill 1998a).

The aim of the COAG Review was to produce a clear definition of the respective roles of government in relation to the environment and to address issues such as accreditation, devolution of programs and the triggering of processes (Hill 1998a; Guest *et al.*, 1999). The primary outcome of the review was an agreement "that the Commonwealth's involvement in environmental matters should focus on matters of national environmental significance" (clause 3, COAG Agreement) and not be extended to matters of local or State significance (Hill 1998a).

The parties to the Agreement identified thirty matters of national environmental significance in which the Commonwealth should be involved. However, the parties suggested that Commonwealth EIA processes should only be triggered by proposals that may have a significant impact on seven of the thirty matters (EDO Network 1998). These seven matters of national environmental significance are World Heritage properties, Ramsar listed wetlands, nationally endangered or vulnerable species and communities, migratory species and cetaceans, nuclear activities, management of the marine and coastal environment, and places of national significance (Part 1 of Attachment 1, COAG Agreement).

The parties to the Agreement concurred that State and Territory processes should be relied upon to assess proposals affecting matters of national environmental significance and that bilateral agreements should be developed so that State and Territory processes and decisions could be accredited. As with the IGAE, the COAG Agreement was developed with limited public consultation and has been criticised for adopting an extremely narrow view of the role of the Commonwealth in EIA (Fowler 1999a; EDO Network 1998; Dawson 1999).

An Introduction to the *Environment Protection and Biodiversity Conservation Act 1999*

The EPBC Act, which came into effect on 16 July 2000, represents the most significant attempt to reform Commonwealth environmental law in Australia since the introduction of the EPIP Act in 1974. The EPBC Act, administered by Environment Australia, replaces five pieces of legislation: the previous EIA statute, the *Environment Protection (Impact of Proposals) Act 1974*, the *National Parks and Wildlife Conservation Act 1975*, the *Whale Protection Act 1980*, the *World Heritage (Properties Conservation) Act 1983* and the *Endangered Species Protection Act 1992*. The statute that repeals the above Acts is the *Environmental Reform (Consequential Provisions) Act 1999*. Three important aspects of the EPBC Act - the list of matters of national environmental significance, environmental assessments and approvals and the accreditation framework - will be discussed below.

Matters of National Environmental Significance

The EPBC Act emphasises the protection of those aspects of the environment that are "matters of national environmental significance" (Guest *et al.*, 1999; EDO Network 1998). Six of the seven matters of national environmental significance identified by the COAG Agreement are direct triggers that invoke the EPBC Act. As discussed earlier, the triggers are World Heritage properties, Ramsar listed wetlands, listed threatened species and communities, listed migratory species, protection of the environment from nuclear actions, and the marine environment (chapter 2, EPBC Act).

To address the seventh matter of national environmental significance identified in the COAG Agreement - places of national significance - the Commonwealth is currently considering the addition of a heritage places trigger to the EPBC Act. The Environment and Heritage Legislation Amendment Bill (No.2) 2000 was introduced to Parliament on 7 December 2000 and has been referred to the Senate Environment, Communications, Information

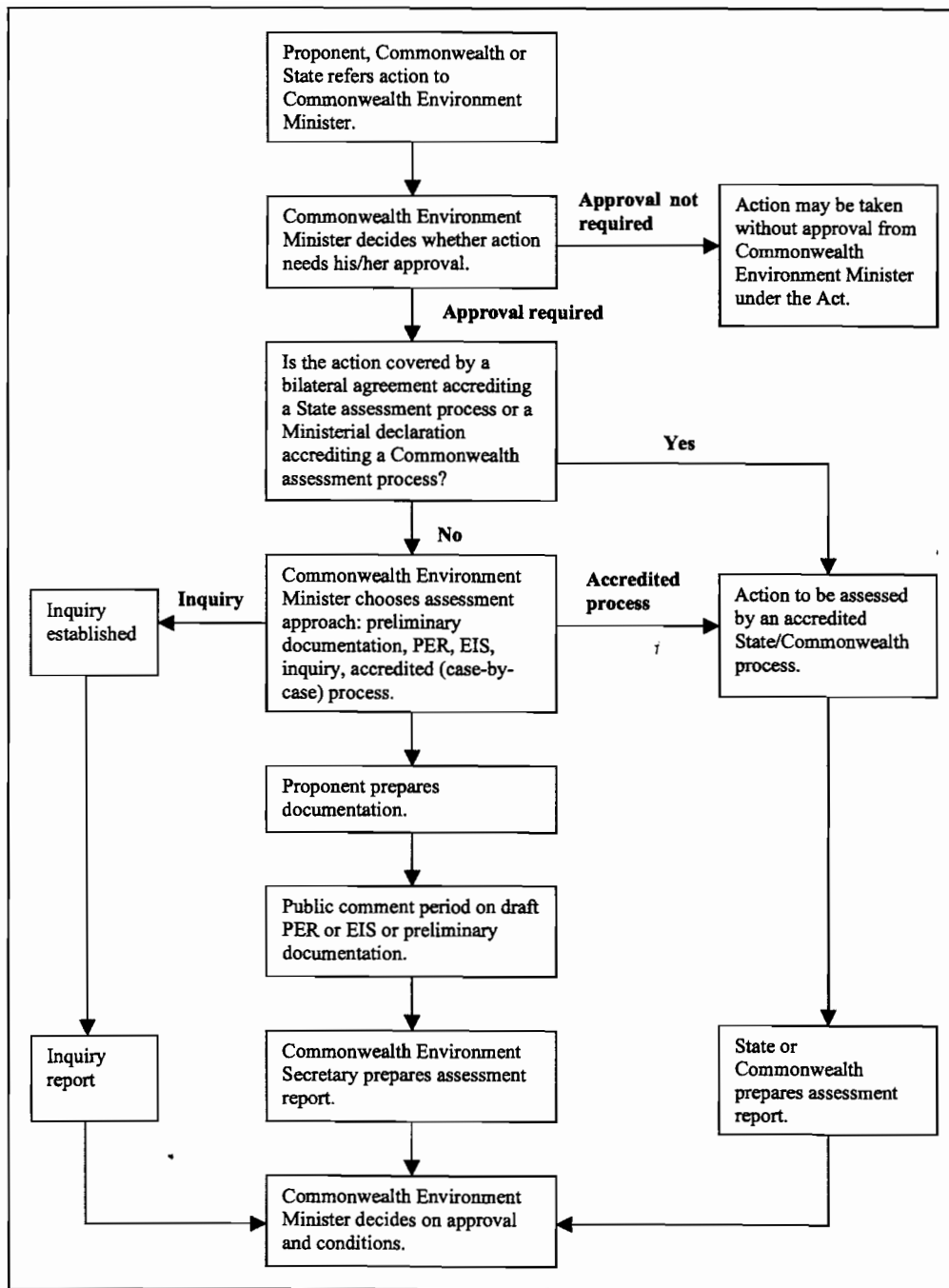


Figure 2. The major steps in the Commonwealth's EIA process under the EPBC Act
 Source: Adapted from Environment Australia (1999c).

Technology and the Arts Reference Committee for inquiry and report by 28 March 2001. This Bill establishes a mechanism for the identification of heritage places of national significance.

Environmental Assessments and Approvals

The assessment and approval process in the Act is triggered by an activity or proposal which may have a significant impact on a matter of national environmental

significance (Hill 1998a). Environmentally significant activities or proposals on Commonwealth places or for which the Commonwealth has sole jurisdiction also trigger the assessment and approval process (Hill 1998b).

The major steps in the EIA process under the EPBC Act are shown in Figure 2. The Environment Minister triggers the process by deciding whether or not approval is necessary and by selecting the method of assessment. There are five levels of assessment: (a) assessment without the preparation of a PER or EIS, (b) a PER, (c) an EIS, (d) a public inquiry, and (e) a one-off accreditation of a State or Commonwealth process. The Environment Minister is responsible for making the final decision regarding project approval.

Bilateral Agreement and Accreditation Framework

The EPBC Act maximises reliance on accredited State and Territory EIA procedures which meet 'appropriate standards' when dealing with matters of national significance (Anton 1998; Hill 1998a). The Act sets up a framework for accreditation by providing for bilateral agreements between the Commonwealth and individual States and Territories.

A bilateral agreement is defined in section 45(2) of the Act as a written agreement between the Commonwealth and a State or a Territory that provides for one or more of the following:

- protecting the environment;
- promoting the conservation and ecologically sustainable use of natural resources;

- ensuring an efficient, timely and effective process for the environmental assessment and approval of actions; and
- minimising duplication in the environmental assessment and approval process through Commonwealth accreditation of State and Territory processes (or vice versa).

Actions covered by bilateral agreements are not subject to the EPBC Act's environmental assessment and approval process. Instead, the bilateral agreement itself will outline the EIA process that a proposal will have to fulfill. The Act provides for two types of bilateral agreements: assessment bilateral agreements that accredit State and Territory assessment processes alone, and approval bilateral agreements that accredit State and Territory assessment and approval processes (Environment Australia 1999a).

There are limitations on a Minister's ability to enter into a bilateral agreement. The Minister has to be satisfied that the agreement will promote the management of a property or wetland in accordance with the Australian World Heritage or Ramsar wetland management principles, for example (sections 51 & 52, EPBC Act). In addition, the Act sets out a number of specific requirements for assessment and approval bilateral agreements. An example of a requirement for assessment bilateral agreements is that the assessment process to be accredited must address all impacts on matters of national environmental significance (section 47(2), EPBC Act). An example of a requirement for approval bilateral agreements is that actions can only be exempted from the need for Commonwealth approval if the State or Territory approves them in accordance with a bilaterally accredited management plan (section 46(1), EPBC Act).

The Role of the Commonwealth in EIA under the *Environment Protection and Biodiversity Conservation Act 1999*

In this section some of the most contentious issues regarding the future role of the Commonwealth in EIA will be discussed. These include the EPBC Act's triggers for Commonwealth involvement in EIA, the decision-making authority in Commonwealth EIA and the accreditation framework. The overarching issue of whether the EPBC Act represents an expansion or devolution of Commonwealth power in EIA will then be considered.

The Triggers for Commonwealth Environmental Impact Assessment

A positive feature of the EPBC Act is that it contains

direct triggers that are based on environmental criteria (Cousin 1999; EDO NSW 1999; Garrett 1999). These triggers for EIA (the six matters of national environmental significance) are far superior to the triggers in the EPIP Act, which were ad hoc and generally unrelated to environmental criteria. Another positive aspect of the EPBC Act is that it allows the Commonwealth to add to the list of triggers by consulting with the States and Territories. The Act does not require that the States and Territories agree on the need for the addition of a trigger. This provision is appropriate since adding to the list of triggers might be an arduous process if agreement of the States and Territories were required.

The EPBC Act's list of triggers has not enjoyed widespread support. Some critics argue that the list is inadequate as it fails to include broad-scale environmental issues of national and international concern such as vegetation clearance, water allocation and land degradation (EDO Network 1999; Garrett 1999; Wells 1999). Another criticism of the Act's list of matters of national environmental significance is the absence of triggers that would have the effect of protecting Australia's forests and reducing greenhouse gas emissions (Connor 1999). The Commonwealth Government is currently considering the addition of a greenhouse trigger - the draft regulation for a greenhouse trigger along with a discussion paper were released on 16 November 2000 (ICF Consulting 1999; Environment Australia 2000). However, the Commonwealth appears unwilling to consult with the States and Territories regarding the addition of a trigger protecting Australia's forests. This is disappointing considering that almost half of Australia's biodiversity is in its forests.

As outlined above, the EIA process under the EPIP Act was often triggered late in the development proposal phase, creating uncertainty for proponents. Some commentators consider that the EPBC Act rectifies this problem by providing a list of triggers that ensure a Commonwealth decision on involvement in EIA will be made up-front (Hill 1998a). If the Act's list of triggers does remove the need for late intervention by the Commonwealth it may increase certainty in the EIA process. However, the extent to which certainty is increased depends largely upon how the Commonwealth applies the trigger criteria.

Decision-Making Authority in Commonwealth Environmental Impact Assessment

It is widely acknowledged that a positive aspect of the EPBC Act is that it transfers decision-making power

from the Action Minister under the EPIP Act to the Minister for the Environment (Wells 1999). This transfer of decision-making power to the Environment Minister is an improvement because, under the EPIP Act, the Environment Minister had an advisory role only. The Action Minister was usually a resource or industry minister and may have been influenced by development concerns. The Environment Minister is more likely to have the appropriate expertise to make informed decisions under the Act and to be more sensitive to the needs of the environment.

Nevertheless, the EPBC Act's provisions regarding the decision-making authority in Commonwealth EIA have also been criticised (EDO NSW 1999). The focus of the debate has been section 33 of the Act. This provision allows the Environment Minister to exempt an action from the need for approval if he or she is satisfied that some other Commonwealth approvals process would be adequate for considering the relevant impacts. This provision has been criticised on the grounds that in effect, it allows the Environment Minister to delegate his or her approval powers back to the relevant Action Minister (EDO NSW 1999). If this delegation were to occur, the status quo of the EPIP Act would be preserved and the opportunity to improve the EIA process would be lost.

Accreditation Framework

The accreditation framework in the EPBC Act is significant as it has the potential to change the scope of Commonwealth involvement in EIA by allowing State and Territory environmental assessment and approval processes to be accredited. However, the concept of accreditation in EIA is not new. Fowler (1996) suggests that the notion can be traced as far back as the 1979 House of Representatives Standing Committee Inquiry. In addition one of the primary aims of agreements such as the *Basis for a National Agreement on Commonwealth Environmental Impact Assessment*, the IGAE and the COAG Agreement, is to enhance cooperation among all levels of government in EIA and to promote the concept of accreditation.

Assessment Bilateral Agreements

Under the repealed EIA legislation (the EPIP Act), the Commonwealth was able to accredit State and Territory environmental assessment processes in cooperative assessments. The EDO NSW (1999) suggests that up to 80 per cent or more of the projects designated for assessment under the EPIP Act were assessed this way. As a result of this trend, there is a view that since "extensive, ad hoc, non-legislative bilateral arrangements have been made for years under the EPIP Act -

Commonwealth legislative provisions regulating the way in which these arrangements are made are not only appropriate, but a step forward" (EDO NSW 1999, p. 18). An extension of this argument is that the EPBC Act simply legitimises the application of the EPIP Act by entrenching it in legislation (EDO NSW 1999; Raff 1999).

Under the EPIP Act, however, accreditation was done on a case-by-case basis only. In contrast, the accreditation framework in the EPBC Act envisages the Commonwealth accrediting State and Territory assessment processes for any actions that are likely to have a significant impact on a matter of national environmental significance and that are covered by bilateral agreements. Thus the EPBC Act significantly expands the ability of the Commonwealth Government to accredit State and Territory environmental assessment processes.

The potential impact of the EPBC Act's framework for assessment bilateral agreements on State and Territory EIA standards is also problematic. Some commentators suggest that the Commonwealth could use the accreditation framework in the EPBC Act to lift the standards of State and Territory EIA processes (Molesworth 1999). The Commonwealth could do so by refusing to accredit these processes unless the States and Territories meet rigorous Commonwealth criteria (EDO Network 1999; Wells 1999; Münchenberg 1998).

Others have countered however, that the accreditation process in the Act may contribute to driving down environmental standards to the lowest common denominator (Senate Legislation Committee 1999; Connor 1998; Mould 1998; Hughes 1999). Their concern is that, under the EPBC Act, the State or Territory which holds out to the lowest level of environmental assessment might set the level for all other States and Territories.

There has also been debate regarding whether the assessment bilateral agreement provisions in the EPBC Act are sufficiently rigorous to ensure adequate environmental standards (EDO NSW 1999; Wells 1999). Environment Australia (1999b, p. 2) states that the EPBC Act "contains a wide range of safeguards to ensure that only 'best practice' State processes are accredited". In contrast to Environment Australia's claim, the EDO NSW (1999) argues that the Act's provisions are not sufficiently rigorous as there is no opportunity for public participation at the draft bilateral agreement stage and there are no direct requirements in the Act as to the content of assessment bilateral agreements. The EDO NSW (1999) further argues that this situation could be

remedied with the inclusion of stringent criteria for assessment bilateral agreements in regulations made under the Act.

Environment Australia (1999a) released a consultation paper that addressed the Commonwealth Government's proposal for developing assessment bilateral agreements in November 1999. The benchmarks for assessment bilateral agreements were finalised and placed in the EPBC Act's regulations which were released along with the EPBC Act's guidelines in July 2000. The EDO Network (1999) considers that the benchmark standards are not stringent enough. Commenting on the consultation paper, the EDO Network (1999, p. 1) claims that the benchmark standards appear to "leave the way open for the accreditation of State EIA processes which are not in legislation or regulations, but merely in administrative guidelines". The finalised benchmark standards have failed to clarify this issue. The main disadvantage of administrative guidelines is that they are not legally enforceable. In addition, if the Commonwealth accredits State and Territory EIA processes in administrative guidelines, it will lose its opportunity to lift legislative standards for EIA in these jurisdictions (EDO Network 1999).

Industry has also criticised the benchmarks for assessment bilateral agreements (Anon. 1999). Some industry groups are concerned that the States and Territories may have to amend their EIA legislation to be accredited by the Commonwealth (Minerals Council of Australia 1998). Industry considers that such amendments could take considerable time and result in delays and uncertainties for proponents (Anon. 1999).

The Commonwealth and Tasmania signed the first assessment bilateral agreement under the EPBC Act on 15 December 2000. Under this agreement, the Commonwealth has accredited two Tasmanian environmental assessment processes - an EIS under the *State Policies and Projects Act 1993* and a Development Proposal and Environmental Management Plan under the *Environmental Management and Pollution Control Act 1994*. At the time of writing, assessment bilateral agreement negotiations between the Commonwealth and a number of other States and Territories were continuing.

Approval Bilateral Agreements

The approval bilateral agreements have been more contentious than the assessment bilateral agreements (Wells 1999; Garrett 1999; EDO Network 1999). The Coalition Government has indicated that the Commonwealth will only consider delegating responsibility for making approval decisions in limited

circumstances and that the EPBC Act reflects this position by including strict safeguards in relation to approval bilateral agreements (Hill 1999). Some State Government officials call these safeguards 'hurdles' and claim that they severely limit the scope of approval bilateral agreements and make them largely unattractive from State or Territory perspectives (Scanlon 1999).

Critics of approval bilateral agreements claim that the potential for the Commonwealth to enter into approval bilateral agreements with the States and Territories is the most significant flaw of the EPBC Act. The EDO NSW (1999) claims that it is highly inappropriate for the Environment Minister to be able to delegate his or her approval powers to the States and Territories since EIA decision-making is, by its very nature, highly discretionary. This high level of discretion is evident from the way approval decisions have been made at Commonwealth, State and Territory levels in the past (Wells 1999; Toyne 1994). Other critics of the delegation of approval powers argue that since the States and Territories are under considerable pressure to attract development, there is a greater likelihood of fair and objective decision-making at the Commonwealth level (Fowler 1999a).

The EPBC Act's framework for approval bilateral agreements has also been criticised on the grounds that once a State or Territory has approved an action under a bilateral agreement, that action can continue even if the bilateral agreement has been suspended or cancelled. In order to prevent the State or Territory from making an inappropriate decision, the Commonwealth would have to revoke the bilateral agreement prior to the decision being made. The ability of the Commonwealth to do so will largely depend on how the bilateral agreements are drafted. For example, if the States and Territories are required to give notice to the Commonwealth of the terms and conditions of a proposed approval then the Commonwealth would have sufficient notice to revoke the bilateral before the decision is made (Mossop & Castan 1999).

The form, content and potential benchmarks for approval bilateral agreements are not currently known. The Coalition Government states that such detail will not be published until substantial progress has been made toward developing assessment bilateral agreements (Environment Australia 1999a).

The Environment Protection and Biodiversity Conservation Act: An Expansion or Devolution of Commonwealth Power in EIA?

One of the more contentious issues about the EPBC Act is whether the Act reflects an expansion or devolution of

Commonwealth power with respect to EIA. Some commentators consider that the EPBC Act reflects the Commonwealth's intention to devolve its powers in EIA to the States and Territories (Fowler 1999a; EDO NSW 1999). They point to the ability of the Commonwealth to accredit State and Territory approval decisions in bilateral agreements as evidence of the Commonwealth's intention to withdraw significantly from the field of EIA (Fowler 1999a). Some critics are dismayed that the Commonwealth would "hand back" its hard-won powers to the States and Territories (Fowler 1999b; Connor 1999).

Others argue that the EPBC Act reflects an expansion of the Commonwealth's power with respect to EIA (Scanlon 1999; Cochrane 1999). They point to the expansive nature of the Act's triggers and often cite the example of the threatened species trigger. The repealed legislation could only address threatened species on 2-3 per cent of Australia's landmass and in Commonwealth waters (Scanlon 1999). Under the EPBC Act, the Commonwealth will now have a role in the environmental assessment and approval of actions significantly affecting threatened species distributed across the entire continent, land and waters (coastal and marine). Supporters of this view claim that the threatened species trigger alone will significantly increase the number of proposals requiring Commonwealth involvement in EIA.

The issue of whether or not the EPBC Act reflects a devolution or expansion of Commonwealth power in EIA cannot be fully resolved until more progress is made in the development of assessment and approval bilateral agreements. Moreover, the extent of Commonwealth involvement in the EIA process will largely depend on the will of the Commonwealth. However, the authors argue that despite claims to the contrary, the EPBC Act has the potential to increase Commonwealth involvement in EIA due to the wide application of the triggers (particularly the threatened species trigger) and the ability of the Environment Minister to make approval decisions. It is likely that this potential will be realised providing that the Commonwealth Government does not devolve all of its approval powers to the States and Territories.

Conclusion

The introduction of the EPIP Act in 1974 marked a major advance in environmental protection in Australia. However, for some time now the EPIP Act has been regarded as outdated and in need of reform. The Federal Government has carried out a number of reviews of the

EPIP Act but until recently no substantial changes were made to the legislation. In February 1998 the Coalition Government announced new reforms to Commonwealth EIA legislation and by July 2000, the EPBC Act had come into effect.

The EPBC Act introduces significant changes to the role of the Commonwealth in EIA such as introducing environmentally-related triggers for Commonwealth involvement in EIA, vesting decision-making power in the Commonwealth Environment Minister and establishing a framework for the accreditation of State and Territory environmental assessment and approval processes. Whilst these changes have attracted widespread debate, the most controversial issue has been whether the EPBC reflects an expansion or devolution of Commonwealth powers with respect to EIA. It is the authors' belief that if the Commonwealth Government retains the majority of its approval powers, the EPBC Act may increase Commonwealth involvement in the EIA process.

References

- Anton, D.K. 1998. Environmental Laws for the 21st Century: What Role for the Commonwealth? *IMPACT*. Environmental Defender's Office. 50: 1-4.
- Australian and New Zealand Environment and Conservation Council. 1996. *Guidelines and criteria for determining the need for and level of EIA in Australia*. ANZECC, Canberra.
- Australian and New Zealand Environment and Conservation Council. 1997. *Basis for a National Agreement on Environmental Impact Assessment*. ANZECC, Canberra.
- Barker, M. 1995. *Harmonising Commonwealth and State EIA Procedures: A View from Western Australia*. Paper presented to Environmental Defender's Office Conference - Commonwealth Environmental Impact Assessment, Sydney. 19-20 October, 1995.
- Bates, G. 1995. *Environmental Law in Australia*. 4th edn. Butterworths, Sydney.
- Cochrane, P. 1999. Detractors out on a limb. *Australian Financial Review*. 1 July 1994, p.19.
- Commonwealth Environment Protection Agency (CEPA). 1993. *Public Review of the Commonwealth Environmental Impact Assessment Process: Initial Discussion Paper - Setting the Direction*. CEPA, Canberra.
- Commonwealth Environment Protection Agency (CEPA). 1994a. *Review of Commonwealth Environmental Impact Assessment: Main Discussion Paper*. CEPA, Canberra.
- Commonwealth Environment Protection Agency (CEPA). 1994b. *Review of Commonwealth Environmental Impact Assessment: Executive Summaries of Consultants' Reports*. CEPA, Canberra.
- Commonwealth of Australia. 1992a. *Australia's National Strategy for Ecologically Sustainable Development*. AGPS, Canberra.

- Commonwealth of Australia. 1992b. *Intergovernmental Agreement on the Environment (IGAE)*. AGPS, Canberra.
- Commonwealth of Australia. 1997. *Heads of Agreement on Commonwealth/State Roles and Responsibilities for the Environment (COAG Agreement)*. AGPS, Canberra.
- Connor, J. 1998. *Public Submissions to the Senate Environment, Recreation, Communication and the Arts Legislation Committee on the Environment Protection and Biodiversity Conservation Bill 1998*. Submission 620, 11: 2320-2326.
- Connor, J. 1999. Australia's new environment laws - Questions and Answers. *Habitat*. 27 (4): 8-9.
- Cousin, R. 1999. *A Victorian Government Perspective of the Proposed EPBC Assessment Framework*. Paper presented to Environment Defender's Office (VIC) Conference - Navigating the New Environment Act, Melbourne. 13 November, 1999.
- Dawson, C. 1999. *Reform of the Australian Capital Territory's Environmental Impact Assessment Regime - Analysis and Recommendations. Internship Paper*. Faculty of Law, Australian National University, Canberra.
- Environment Australia. 1997. *Commonwealth Environmental Impact Assessment: An Outline of the Commonwealth EIA Process*. Environment Australia, Canberra.
- Environment Australia. 1999a. *Regulations and Guidelines under the Environment Protection and Biodiversity Conservation Act 1999 - A Consultation Paper*. Department of the Environment and Heritage, Canberra.
- Environment Australia. 1999b. *Environment Protection and Biodiversity Conservation Act - Benefits for the Environment*. Department of the Environment and Heritage, Canberra.
- Environment Australia. 1999c. *An Overview of the Environment Protection and Biodiversity Conservation Act*. Department of the Environment and Heritage, Canberra.
- Environment Australia. 2000. *Discussion Paper: Greenhouse Trigger under the Environment Protection and Biodiversity Conservation Act 1999*. Department of the Environment and Heritage, Canberra.
- Environmental Defender's Office (EDO) Network. 1998. *Submission to the Senate Environment, Recreation, Communications and the Arts Legislation Committee on the Environment Protection and Biodiversity Conservation Bill 1998*. EDO, Sydney.
- Environmental Defender's Office (EDO) Network. 1999. *Submission on the Consultation Paper issued by Environment Australia: "Regulations and Guidelines under the EPBC Act 1999"*. EDO, Sydney.
- Environmental Defender's Office (EDO) NSW. 1999. *Analysis of the Environment Protection and Biodiversity Conservation Act 1999 (Cth)*. EDO NSW, Sydney.
- Fowler, R.J. 1994. New National Directions in Environmental Protection and Conservation, in *Environmental Outlook - Law and Policy*. Boer, B., Fowler, R. & Gunningham, N. (eds), 1994. Federation Press, Sydney, pp. 113-149.
- Fowler, R.J. 1996. Environmental Impact Assessment: What Role for the Commonwealth? - An Overview. *Environmental and Planning Law Journal*. 13(4): 246-259.
- Fowler, R.J. 1999a. *Submission to the Senate Environment, Communications, Information Technology and the Arts References Committee re Environment Protection and Biodiversity Conservation Bill 1998*. Adelaide.
- Fowler, R.J. 1999b. *Future Directions - Where to from here? The next 10 years*. Paper presented to National Environmental Defender's Office Network Conference - A New Green Agenda, Sydney. 14 October, 1999.
- Garrett, P. 1999. *Commonwealth environment powers - An environment movement perspective*. Paper presented to National Environmental Defender's Office Network Conference - A New Green Agenda, Sydney. 14 October, 1999.
- Gascoigne, N. 1997. *Commonwealth Perspective of EIA in Australia*. Proceedings of EIA for the 21st Century Conference, Adelaide. 9-11 April, 1997.
- Glasson, J., Therivel, R. & Chadwick, A. 1994. *Introduction to Environmental Impact Assessment*. UCL Press Ltd, London.
- Guest, K., Michaelis, F. & McCormick, B. 1999. *Environment Protection and Biodiversity Conservation Bill 1998*. Bills Digest No.135. Information and Research Services, Department of the Parliamentary Library, Canberra.
- Hill, R. 1998a. *Reform of Commonwealth Environment Legislation - Consultation Paper*. AGPS, Canberra.
- Hill, R. 1998b. *Environment Protection and Biodiversity Conservation Bill 1998 - Second Reading Speech*. Department of the Parliamentary Library, Canberra.
- Hill, R. 1999. Opening Address - Reform of Commonwealth Environmental Law, in *Australian Centre for Environmental Law Environmental Outlook No. 3*. Leadbeter, P., Gunningham, N. & Boer, B. (eds). The Federation Press, Sydney.
- House of Representatives Standing Committee on Environment and Conservation. 1979. *Environmental Protection: Adequacy of Legislative and Administrative Arrangements - First Report*. AGPS, Canberra.
- Hughes, L. 1999. Environmental Impact Assessment in the Environment Protection and Biodiversity Act 1999 (Cth). *Environmental and Planning Law Journal*. 16(5): 441-467.
- ICF Consulting. 1999. *Possible Application of a Greenhouse Trigger under the Environment Protection and Biodiversity Conservation Act 1999*. Department of Environment and Heritage, Canberra.
- McDonald, J. 1998. *Public Submissions to the Senate Environment, Recreation, Communication and the Arts Legislation Committee on the Environment Protection and Biodiversity Conservation Bill 1998*. Submission 152(2): 482-488.
- Minerals Council of Australia. 1998. *Public Submissions to the Senate Environment, Recreation, Communication and the Arts Legislation Committee on the Environment Protection and Biodiversity Conservation Bill 1998*. Submission 335(5): 1061-1092.
- Molesworth, S. 1999. *Future Directions - Australian and international best practice comparisons*. Paper presented to National Environmental Defender's Office Network Conference - A New Green Agenda, Sydney. 14 October, 1999.

- Mossop, D. and Castan, A.R. 1999. *Environment Protection and Biodiversity Act 1999: Opinion*. ACF Campaigns, Commonwealth Environment Laws. Accessed March 1999 at http://www.acfonline.org.au/campaigns/epbc/discussion/casten_mossop.htm
- Mould, H. 1998. The Proposed Environment Protection and Biodiversity Conservation Act - the Role of the Commonwealth in Environmental Impact Assessment. *Environmental and Planning Law Journal*. 15(4): 275-287.
- Münchenberg, S. 1994. Review of the Commonwealth Environmental Impact Assessment Process. Editorial. *Environmental and Planning Law Journal*. 11(6): 460.
- Münchenberg, S. 1995. *Review of the Commonwealth Environmental Impact Assessment Process: Initial Response of the Commonwealth Government*. Paper presented to Environmental Defender's Office Conference - Commonwealth Environmental Impact Assessment, Sydney. 19-20 October, 1995.
- Münchenberg, S. 1997. Review of Commonwealth/State Roles and Responsibilities for the Environment. *Environmental and Planning Law Journal*. 14(2): 148-153.
- Münchenberg, S. 1998. Commonwealth Environment Legislation Review - a Small Revolution. *Environmental and Planning Law Journal*. 15(2): 77-82.
- Münchenberg, S. 1999. EIA and the Politics of Reform, in *Australian Centre for Environmental Law Environmental Outlook No. 3: Law and Policy*. Leadbeter, P., Gunningham, N. & Boer, B. (eds). The Federation Press, Sydney.
- Prest, J. & Downing, S. 1998. *Shades of Green? Proposals to Change Commonwealth Environmental Laws*. Research Paper 16 1997-98. Department of the Parliamentary Library, Canberra.
- Raff, M. 1999. *The EPBC Act Consultation Paper: Bilateral Agreements*. Paper presented to Environment Defender's Office (VIC) Conference - Navigating the New Environment Act, Melbourne. 13 November, 1999.
- Rio Declaration. 1992. United Nations Conference on Environment and Development.
- Scanlon, J. 1999. *Commonwealth environment powers - A State's perspective*. Paper presented to National Environmental Defender's Office Network Conference - A New Green Agenda, Sydney. 14 October, 1999.
- Senate Environment, Communications, Information Technology and the Arts Legislation Committee (Senate Legislation Committee). 1999. *Report of the Environment Protection and Biodiversity Conservation Bill 1998 and Environmental Reform (Consequential Provisions) Bill 1998*. Commonwealth of Australia, Canberra.
- Stone, Y. 1995. *The Thresholds of Commonwealth Reach in EIA*. Paper presented to Environmental Defender's Office Conference - Commonwealth Environmental Impact Assessment, Sydney. 19-20 October, 1995.
- Thomas, I. 1998. *Environmental Impact Assessment in Australia: Theory and Practice*. 2nd edn. The Federation Press, Leichhardt.
- Toyne, P. 1994. *The Reluctant Nation - Environment, law and politics in Australia*. ABC Books, Maryborough.
- United Nations (UN). 1992. *Agenda 21: Program for action for sustainable development*. United Nations, New York.
- Wells, K. 1999. *Environmental impact assessment - an Environmental Defender's Office critique*. Paper presented to National Environmental Defender's Office Network Conference - A New Green Agenda, Sydney. 14 October, 1999.
- Wood C. 1995. *Environmental Impact Assessment: A Comparative Review*. Addison Wesley Longman Limited, Harlow.